Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-270

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare; MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children; ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association; SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association; NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Wayne A. Stanton, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare; Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert G. Watson, Jr., James W. Burnett, Jr., individually and in their capacity as members of the State Board of Public Welfare, respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh

Circuit (hereafter Seventh Circuit), entered in cause number 75-1459 on May 20, 1977, which reaffirmed the judgment of the United States District Court for the Northern District of Indiana, Hammond Division (hereafter District Court).

OPINIONS BELOW

The opinion of the Seventh Circuit issued on May 20, 1977, has not been officially reported. A copy of said opinion has been appended hereto at page A-1. The January 13, 1975, Order of the District Court has not been officially reported, but a copy of said Order is appended hereto at page A-13. The Seventh Circuit's opinion dated January 7, 1976, has been reported at 528 F.2d 688 (7th Cir., 1976), and a copy has been appended hereto at page A-7.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on an important question of federal law which has not been, but should be, settled by this Court, and on which the Circuit Courts are divided.

The decision of the Seventh Circuit was entered on May 20, 1977. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Amendment to the Constitution of the United States is an absolute bar to an award of attorney fees against officials of the State of Indiana when such an award is made against them in their official capacities.

2. Whether Public Law 94-559 permits the award of attorney's fees, thereby overriding the Eleventh Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

42 U.S.C. § 1988 provides as follows:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys's fee as part of the costs.

STATEMENT OF THE CASE

This Petition arises from a reaffirmance by the Seventh Circuit of an Order issued by the District Court in the case of *Bond v. Stanton*, Cause No. 73 H 184, whereby the District Court ordered the Petitioners herein to pay $2,366.00 in attorney fees for Respondents' (Plaintiffs' below) counsel.

Facts Material to the Consideration of the Questions Presented

The original lawsuit was commenced on July 23, 1973, when Plaintiffs filed a complaint in the District Court alleging that Indiana's Early and Periodic Screening, Diagnoses and Treatment program (hereafter EPSDT) was unacceptable under the statutes and regulations of the Congress of the United States, and seeking an injunction

mandating the State to institute an acceptable EPSDT program.

The Action by Plaintiffs was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343 (3) and (4), 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 28 U.S.C. § 1331, and was decided on cross motions for Summary Judgment in favor of Plaintiffs. *Bond v. Stanton*, 372 F. Supp. 872 (N.D. Ind., 1974). The District Court held that the State of Indiana, through its Welfare Department, had not complied with the provisions of the Social Security Act, 42 U.S.C. § 1396d (a) (4) (B), as of March 1, 1974. The Court permanently enjoined Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them "from continuing to administer EPSDT in violation of 42 U.S.C. § 1396d (a) (4) (B) and the regulations established thereunder, 45 CFR 249.10 (a) (3)," and further, "Defendants are ordered to have a program of Early and Periodic Screening Diagnoses and Treatment (EPSDT) in effect in every county by July 1, 1974."

The decision of the District Court was affirmed by the Seventh Circuit on October 30, 1974, 504 F.2d 1246. Certiorari was denied on March 17, 1975, 95 S.Ct. 1415 (1975). In the meantime, the District Court, on January 13, 1975, entered its Order granting attorneys' fees to Plaintiffs' attorneys in the amount of $2,366.00, finding that there was a lack of good faith on the part of the Defendants in implementing the EPSDT program, and holding that the Eleventh Amendment did not bar an award of attorneys' fees against state officials. The Seventh Circuit affirmed that Order on January 7, 1976. 528 F.2d 688. This Court granted a writ of certiorari on June 1, 1976. 96 S.Ct. 2224 (1976). However, on October 19, 1976, the President signed Public Law 94-559, 42 U.S.C. § 1988, which purports to grant attorney fees in certain situations. This Court vacated the January 7, 1976, Order of the Seventh Circuit, and remanded the case to that Court for "further consideration in light of Pub. L. 94-559." 97 S.Ct. 479 (1977).

In an order dated June 3, 1975, issued upon a request for attorneys' fees by Plaintiffs following the appeal by the Petitioners herein of the case on the merits, the Seventh Circuit stated that the case was ". . . not an appropriate case for utilization of the 'common benefit' or 'common fund' theory," and further held that there was no evidence that the Defendants were in bad faith in prosecuting an appeal. See Appendix page A-16.

On February 19, 1976 the Seventh Circuit denied Plaintiffs' request for attorneys' fees following the appeal by Petitioners of the award of attorneys' fees by the District Court. See Appendix page A-17.

REASONS FOR ALLOWANCE OF THE WRIT

I

The Eleventh Amendment is an Absolute Bar to an Award of Attorney Fees Against State Officials Sued in Their Official Capacities

The issue of the Eleventh Amendment bar to an award of attorney fees against state officials has been decided differently by various Circuit Courts of the United States Court of Appeals prior to the passage of Public Law 94-559. In its first decision on attorney fees in this case, the Seventh Circuit held that the Eleventh Amendment was not a bar, and stated that it considered itself ". . . bound by the Supreme Court's summary affirmance in *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala.) *aff'd*, 409 U.S. 942 (1972)." However, the decision of the Seventh Circuit to follow the summary affirmance of *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala., 1972), ignored this Court's summary affirmance of *Murgia v. Commonwealth of Massachusetts Board of Retirement*, 386 F.Supp. 179 (D.C. Mass., 1974) *aff'd* 421 U.S. 972 (1974), and is contrary to decisions of the Third,

Fifth and Sixth Circuits. In *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir., 1974) *cert. denied* 95 S.Ct. 1996 (1975) the Sixth Circuit stated at pages 709 and 710:

> Careful study of *Edelman* opinion leads us to conclude, as did the Third Circuit, that the Eleventh Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states . . . The Amendment bars any award which is 'measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the Defendant state officials.' *Edelman, supra* 94 S.Ct. at 1358.

The Respondents would submit that attorney fees are not chargeable against them due to the applicability of the Eleventh Amendment to the Constitution of the United States, which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State.

Any recovery of attorneys' fees by the plaintiffs would not come from the named defendants, who are merely nominal parties, but would come from the State Treasury. In fact, the Order of the District Court specifically stated as follows:

> Therefore, it is hereby ordered that the plaintiffs request for attorney fees is granted and the defendants, Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, *in their official capacities* are hereby ordered to pay the sum of $2,366.00 to the plaintiffs as attorney fees . . . (Emphasis supplied) Appendix, p. 10.

As this Court said in *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1945) at page 464:

> . . . When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants (cases omitted).

This statement was cited with approval in the case of *Edelman v. Jordan*, 94 S.Ct. 1347, 1356 (1974) where this Court stated:

> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. (Citing cases)

Therefore, since the Decision by the District Court orders a payment by the Defendants in their official capacities, the Order is in reality against the State of Indiana and is barred by the Eleventh Amendment to the Constitution of the United States.

II

PUBLIC LAW 94-559 DOES NOT OVERRIDE THE ELEVENTH AMENDMENT AND IS NOT APPLICABLE TO THIS CASE

A.

The Definition of "Person" under 42 U.S.C. § 1983 Has Not Been Amended to Include States

The State Defendants would assert that Public Law 94-559 (hereafter the Act) is not applicable here since the statute does not specifically include states pursuant to *Fitzpatrick v. Bitzer*, 96 S.Ct. 2666 (1976), and therefore, does not permit fees in this case. In *Bitzer*, the award of fees was made pursuant to an express statutory provision, 42 U.S.C. § 2000e-5(k), part of the statute which originally permitted the lawsuit. That section provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the commission and United States shall be liable for costs the same as a private person.

However, that statute must be read in conjunction with another section of Title VII, 42 U.S.C. § 2000e(a), which provides that the definition of "person" includes "governments, governmental agencies, [and] political subdivisions."

As this Court stated in *Bitzer*, at page 2670:

> Our analysis begins where *Edelman* ended, for *in this Title VII case the "threshold fact of congressional authorization,"* 415 U.S., at 672, 94 S. Ct., at 1360, *to sue the State as employer is clearly present* . . . (Emphasis supplied).

Of critical importance here is the fact that the Act does not amend the definition of "person" found in 42 U.S.C. § 1983 to cover states. This Court stated in *Bitzer*, at page 2669:

> . . . The Civil Rights Act of 1871, 42 U.S.C. § 1983, has been held in *Monroe v. Pape*, 365 U.S. 167, 187-191, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, *it could not have been intended to include States as parties defendant:* (Emphasis supplied).

Therefore, since the attempted award was made against the State Defendants in their official capacities, it is against the "State" and must fail since the State is not a "person" under 42 U.S.C. § 1983.

B.

The Act is Not Applicable to Claims of Alleged Statutory Violations

Awards of attorney fees against state officials have been of growing concern to all state governments. That concern was compounded by *Fitzpatrick v. Bitzer, supra*, wherein this Court held at page 2671:

> . . . we think that the Eleventh Amendment, and the principles of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1 (1890) are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. *When Congress acts pursuant to § 5 not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment*, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, supra.* (Emphasis supplied).

In affirming the award of attorney fees in *Bitzer* this Court did not grant blanket approval to all awards of attorney fees against States, but held only that such an award may be permissible when Congress legislates pursuant to § 5 of the Fourteenth Amendment.

There was no Fourteenth Amendment issue raised in this case, nor were the decisions of the District Court or the Seventh Circuit based upon that Amendment. While the

original action was brought for a claim under 42 U.S.C. § 1983 pursuant to 28 U.S.C. §§ 1343(3) and (4), for a claim pursuant to 28 U.S.C. § 1331, and for declaratory relief pursuant to 28 U.S.C. § 2201 and 2202, the specific allegations were that the State had not complied with provisions of the Social Security Act, 42 U.S.C. § 1396d(a)(4)(B) and regulations promulgated thereunder, in implementing a medicaid screening program.

Even though 42 U.S.C. § 1983 is one of the statutes purportedly covered by the Act, it is important to realize that § 1983 encompasses both constitutional and statutory rights. *King v. Smith,* 392 U.S. 309 (1968); *Townsend v. Swank,* 404 U.S. 283 (1971). This case involves only statutory rights under § 1983, and the only constitutional issues that could be involved as the case was pleaded would arise under the General Welfare Clause, Article 1, § 8 of the Constitution of the United States, the foundation for the creation of the Social Security Act. *Helvering v. Davis,* 301 U.S. 619 (1937). Thus, the substantive statute that was allegedly violated was not enacted pursuant to § 5 of the Fourteenth Amendment.

In *Bitzer,* this Court stated at page 2671:

> . . . We think that *Congress may in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment provide for private suits against States or State officials* which are constitutionally impermissible in other contexts . . . (Emphasis supplied).

Thus, if Congress passes a statute pursuant to § 5 of the Fourteenth Amendment such as the Amendments to Title VII in *Bitzer,* which allows suit against a state, and further provides a remedy *within that statute* for the award of attorney fees, then that remedy would be constitutionally permissible. However, if Congress purports to pass a statute under § 5 of the Fourteenth Amendment to apply to *any* suit regardless of the Constitutional or statutory

basis for the original substantive action, then that attempt is not constitutionally permissible.

The Seventh Circuit's opinion holds that the State's Eleventh Amendment rights may be eliminated by passing a general statute to provide for a remedy in a case under the General Welfare clause of the Federal Constitution even though such enactment was prior to the Eleventh Amendment, and attempts to justify that action by saying that:

> Congress intended Pub. L. No. 94-559 as an exercise of its power under § 5 of the Fourteenth Amendment . . .

However, it is not legally significant what Congress says regarding how the Constitution should apply. That decision is for this Court, and has been so recognized since *Marbury v. Madison,* 1 Cranch 137, 177 (1803).

As Mr. Justice Black said in *Oregon v. Mitchell,* 400 U.S. 112, 128 (1970):

> As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. *First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.* Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." . . . (Emphasis supplied.)

In *Employees of the Department of Public Health and Welfare v. Missouri,* 411 U.S. 279 (1973), this Court held that the Fair Labor Standards Act did not supersede the sovereign immunity of the State, holding at page 284:

> . . . It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications desired silently to deprive the States of an immunity they have long enjoyed under another part of the constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

Thus, it is equally true that the enactment of the Social Security Act pursuant to the "general welfare" clause of the Constitution, Art. 1, § 8 would be on the same footing and cannot operate as a deprivation of the Eleventh Amendment defense granted to the states.

This position has been recently adopted by a District Court in Pennsylvania in an attorney's fees case entitled *Skehan v. Board of Trustees of Bloomsburg State College,* 46 U.S.L.W. 2046 (Aug. 2, 1977).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1459

LOUISE BOND, individually and on behalf of her minor children; ROSE EDWARDS, as President, NEW DAY WELFARE RIGHTS ORGANIZATION, an unincorporated association; SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association; NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare; MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare; JOHN KELLEY, individually and in his capacity as Director of the Lake County Department of Public Welfare,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. CV 73 H 184—ALLEN SHARP, *Judge.*

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES
DECIDED MAY 20, 1977

Before CUMMINGS and TONE, *Circuit Judges,* and HOFFMAN, *Senior District Judge.*•

TONE, *Circuit Judge.* In *Bond v. Stanton,* 528 F.2d 688 (7th Cir. 1976), we held that the Eleventh Amendment does not bar the assessment of attorneys' fees against state officials sued in their official capacity under 42 U.S.C. § 1983 and sustained an award against the defendants predicated on the District Court's finding of their bad faith.[1] The Supreme Court vacated our judgment and remanded the case to us "for further consideration in light of Pub. L. No. 94-559 (Oct. 19, 1976)." 97 S.Ct. 479 (1977). We are thus to determine whether the application of the new statute eliminates the constitutional issue from the case. Our decision should of course be made on non-constitutional grounds if possible.

Pub. L. No. 94-559, 90 Stat. 2641, 45 U.S.L.W. 165 (Dec. 14, 1976), amends 42 U.S.C. § 1988 by adding the following sentence:

> "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United

• The Honorable Julius J. Hoffman, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation. Mr. Justice, then Judge, Stevens was a member of the original panel. On remand he is replaced by Judge Cummings.

[1] We did so in reliance on the Supreme Court's summary affirmance in *Sims v. Amos,* 340 F.Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972). Defendants now tell us this was error because a later summary affirmance is inconsistent with the one in *Sims, Murgia v. Massachusetts Board of Retirement,* 386 F.Supp. 179 (D. Mass.), *aff'd,* 421 U.S. 972 (1974). Although the point is now academic, we note that the two Supreme Court orders are not necessarily inconsistent, because in *Murgia* the district court had denied attorneys' fees not only on the Eleventh Amendment ground but, alternatively, "as a matter of discretion." 386 F. Supp. at 182.

> States, a reasonable attorney's fee as part of the costs."[2]

The act is to be applied to pending cases unless doing so "would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of the City of Richmond,* 416 U.S. 696, 711 (1976); *Thorpe v. Housing Authority of the City of Durham,* 393 U.S. 268, 281 (1969). Especially in light of the finding of bad faith, 528 F.2d at 690, the modest allowance of attorneys' fees made by the District Court would not work a manifest injustice in this case. Nor are we persuaded by the argument that the combined impact on state treasuries of applying the act to all pending cases would result in manifest injustice. Plaintiffs will be eligible for an allowance of fees in those cases only if they prevail, and even then the allowance is subject to the court's discretion, which we must assume will be exercised to achieve a just result.

The act itself is silent on the question of its application to pending cases. The legislative history, however, clearly indicates that Congress intended to cover not only pending cases generally but this case in particular. See Remarks of Senators Abourezk and Kennedy,[3] 122 Cong. Rec. S17052 (daily ed. Sept. 29, 1969), and Representatives Anderson, 122 Cong. Rec. H12155, and Drinan, *id.* at H12160 (daily ed. Oct. 1, 1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.6 (1976). An amendment proposed by Representative Ashbrook which would have expressly limited the act to cases filed after its effective date was defeated. 122 Cong. Rec. H12166 (daily ed. Oct. 1, 1976).

It is equally clear that Congress intended that the act extend to statutory claims asserted under § 1983. Congress was aware that many § 1983 cases are, like the present case, decided on statutory rather than constitutional

[2] Section 1979 of the Revised Statutes, referred to in the act, is 42 U.S.C. § 1983.

[3] Senator Kennedy said:

> "In a case now pending, officials accepted Social Security Act funds for years for certain medical screening programs when in fact they had no such programs in most of the state.
>
> ". . . [I]n each of these cases, the victim . . . had to go to court to enforce the rights promised by Congress or the Constitution."

grounds and intended that Pub. L. No. 94-559 cover all such cases. See Remarks of Senators Kennedy and Abourezk, 122 Cong. Rec. S17052, 17053 (daily ed. Sept. 29, 1976), and of Representative Drinan, *id.* at H12159 (daily ed. Oct. 1, 1976).

It is also clear that Congress intended the act to apply to actions against state officials in their official capacity. This case and others referred to in the legislative history are just such cases, as are many, if not most, of the cases brought under § 1983. *E.g., Edelman v. Jordan,* 415 U.S. 651, 667-668 (1974). See also *Ex parte Young,* 209 U.S. 123 (1908). Recognizing that the bill would cover government officials in their official capacity and authorize damages which would have an impact upon the treasuries of state and local governments, Senator Helms proposed an amendment which would have exempted state and local governments from the act. 122 Cong. Rec. S16432 (daily ed. Sept. 22, 1976). This amendment was tabled. *Id.* at S16433-16434.

Congress having intended to impose liability for attorneys' fees on state officials in their official capacity, the only question remaining is whether it had power to do so in view of the Eleventh Amendment[4]. In *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), the Court sustained Congress' power to order back pay and attorneys' fees in an action against a state under Title VII. The Court held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana,* 134 U.S. 1 (1890), are necessarily limited by the the enforcement provisions of § 5 of the Fourteenth Amendment." Legislation adopted by Congress pursuant to that section for purposes of enforcing the provisions of the Fourteenth Amendment may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Id.* at 456.

In exercising these enforcement powers under § 5, Congress is not limited to remedying inequalities which the

[4] It is irrelevant that the state is not a person under § 1983, if indeed the defendants are correct in arguing that it is not. State officials clearly are. The Eleventh Amendment issue arises, not because the state is sued, for it is not, but because an award of attorneys' fees would have an impact on the state treasury. See *Edelman v. Jordan,* 415 U.S. 651 (1974).

courts would determine to be violative of the Constitution. It may prohibit conduct which would not otherwise be unlawful, in order to secure the guarantees of the Fourteenth Amendment. *Katzenbach v. Morgan,* 384 U.S. 641, 652-653, 656 (1966). See also Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. 91, 107 (1966). And, as *Katzenbach v. Morgan* holds, great deference is to be accorded to Congress' determination of what measures are appropriate to that end. 384 U.S. at 653.

Congress intended Pub. L. No. 94-559 as an exercise of its power under § 5 of the Fourteenth Amendment and under the identical grant of the Thirteenth Amendment. See Remarks of Senator Abourezk, 122 Cong. Rec. S17052-17053 (daily ed. Sept. 29, 1976), and Representative Drinan, *id.* at H12160 (daily ed. Oct. 1, 1976); S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976), 1976 *U.S. Code Cong. & Adm. News* at 6343; H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 n.14 (1976). Its frequently expressed purpose in adopting the act was to assure that the opportunity to enforce federal civil rights would be available to all. The new legislation was intended to give "effective access to the judicial process" to the "vast majority of the victims of civil rights violations [who] cannot afford legal counsel," and thereby "to promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1, 9 (1976); see also S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976), 1976 *U.S. Code Cong. & Adm. News* at 6343; Remarks of Senators Scott, Mathias, Kennedy, and Tunney, 122 Cong. Rec. S16251-16252 (daily ed. Sept. 21, 1976); *id.* at S17051 (daily ed. Sept. 29, 1976), and Representatives Kastenmeier, Fish, Holtzman, Jordan, and Seiberling, *id.* at H12155, 12163-12165 (daily ed. Oct. 1, 1976). Under the standard in *Katzenbach v. Morgan, supra,* 384 U.S. at 653, the act was thus plainly within Congress' power under § 5 of the Fourteenth Amendment.

Even assuming that, contrary to our holding in our earlier decision, an award of attorneys' fees against the defendants in their official capacity would offend the

Eleventh Amendment in the absence of the new act, the constitutional impediment is removed by the act. The Fourteenth Amendment qualifies the Eleventh, and when Congress acts pursuant to its power under the Fourteenth, the Eleventh must yield.

AFFIRMED.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1459

LOUISE BOND, individually and on behalf of her minor children; ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association; SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association; NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

vs.

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare; MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare; JOHN KELLEY, individually and in his capacity as Director of the Lake County Department of Public Welfare,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division
No. CV 73 H 184
ALLEN SHARP, *Judge.*

Argued October 31, 1975—Decided January 7, 1976

Before STEVENS, *Circuit Justice,** TONE, *Circuit Judge,* and HOFFMAN, *Senior District Judge.***

TONE, *Circuit Judge.* This appeal presents the question of whether the eleventh amendment bars the assessment of attorneys' fees against state officials sued in their official capacity under 42 U.S.C. § 1983. We hold that it does not, because we consider ourselves bound by the Supreme Court's summary affirmance in *Sims v. Amos,* 340 F.Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972).

Plaintiffs brought this class action to compel the defendant Indiana officials to comply with an amendment to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396g, which was added in 1967. That amendment, 42 U.S.C. § 1396d(a) (4) (B), required the states to adopt an early and periodic screening, diagnosis, and treatment (EPSDT) program for all Medicaid-eligible children, covering those under six years of age by February 7, 1972, and those under twenty one by July 1, 1973. When the defendant officials failed to meet either deadline, plaintiffs brought this action. The District Court found that defendants had failed to comply with the amendment and ordered them to do so by July 1, 1974, reserving the question of attorneys' fees. 372 F.Supp. 872 (N.D. Ind. 1974). This court affirmed. 504 F.2d 1246 (7th Cir. 1974). Later, in an unpublished order, the District Court assessed attorneys' fees against defendants in their official capacities in the amount of $2,366. The award was based on the private attorney general theory, now defunct by reason of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), and on the defendants' bad faith both in failing to comply with the requirements of federal law before the action was commenced and in the course of the litigation. This is an appeal from that order.

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* Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

** Senior District Judge Julius J. Hoffman of the Northern District of Illinois is sitting by designation.

A federal court has inherent power to assess attorneys' fees against a losing party who has acted in bad faith. See *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* 421 U.S. at 259; *F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974). The bad faith which is the basis for the award may be in the conduct which necessitated the action or in conduct occurring during the course of the action. *Hall v. Cole,* 412 U.S. 1, 15 (1973).

The District Court's finding of bad faith in this case is amply supported by the evidence. The defendant state officials, disregarding their clear legal duty, were, in the words of the District Court, "more than two years late in even attempting to implement a statewide EPSDT program." It was this conduct which necessitated the present injunctive suit. *Cf. Doe v. Poelker,* 515 F.2d 541, 548 (8th Cir. 1975); *Fairley v. Patterson,* 493 F.2d 598, 606 (5th Cir. 1974). In addition, defendants, after suit was filed, "continually asserted compliance with HEW requirements in the face of documentation to the contrary." Stringent as the standards for establishing bad faith may be, *Satoskar v. Indiana Real Estate Commission,* 517 F.2d 696, 698 (7th Cir. 1975), they were more than satisfied by the facts before us. The award of attorneys' fees was therefore justified unless barred by the Constitution.

As noted by the Supreme Court in *Alyeska, supra,* 421 U.S. at 269 n. 44, and by us in *Satoskar, supra,* 517 F. 2d at 698 n.,[1] the circuits are divided on the question of whether the eleventh amendment prohibits assessment of attorneys' fees against a state or state officers acting in their official capacity. Courts have also differed about whether lower federal courts faced with that question are bound by the Supreme Court's summary affirmance of

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[1] In addition to the cases cited in the footnote in *Alyeska* and *Satoskar* referred to in the text, see *Gates v. Collier,* — F.2d —, No. 73-1790 (5th Cir. 1975) and *Newman v. Alabama,* — F.2d —, No. 73-2033 (5th Cir. 1975) (both cases remanding issue of attorneys' fees to the district court for reconsideration; *Mathews v. Bitzer,* — F.2d —, No. 75-2581 (2d Cir. 1975), *cert. granted,* 44 U.S.L.W. 3354 (Dec. 15, 1975); *cf. Hoitt v. Vitek,* 361 F. Supp. 1238, 1255 (D. N.H. 1973), *aff'd,* 495 F.2d 219 (1st Cir. 1974). For a comprehensive discussion of attorneys' fees and the eleventh amendment see Note, 88 *Harv. L. Rev.* 1875 (1975).

Sims v. Amos, supra.[2] In that case a three-judge court, after finding malapportionment in the Alabama legislature, 336 F.Supp. 924, awarded attorneys' fees and costs to the plaintiffs, 340 F.Supp. 691. It is not clear from the second opinion of the three-judge court in *Sims,* 340 F.Supp. 691, which dealt with attorneys' fees and costs, whether the defendant state officials asserted their constitutional immunity, although the court did say in a footnote that the state had no power to impart any immunity to its officers "from [an] injunction or from its consequences, including court costs incident thereto." 340 F. Supp. at 694 n. 8. The Supreme Court, however, will consider a claim of immunity under the eleventh amendment even though it was not raised in the trial court. *Edelman v. Jordan, supra,* 415 U.S. at 677-678. And, in their jurisdictional statement filed in the Supreme Court, the *Sims*

[2] The Ninth Circuit relied on *Sims* in awarding attorneys' fees in *Brandenburger v. Thompson,* 494 F.2d 885, 888 (9th Cir. 1974). A majority of the Fifth Circuit, sitting in banc, evidently did not view *Sims* as controlling in *Newman v. Alabama, supra,* — F.2d —, when they remanded for reconsideration in light of *Alyeska* and *Edelman v. Jordan,* 415 U.S. 651 (1974), but five members of that court, speaking through Judge Gewin, felt bound by *Sims.* See also the companion case of *Gates v. Collier, supra,* — F.2d —, in which Judge Tuttle, writing for himself and the five dissenters in *Newman,* endorsed Judge Gewin's *Newman* dissent. In the Sixth Circuit, two panels have not followed *Sims. Jordan v. Gilligan,* 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975); *Taylor v. Perini,* 503 F.2d 899 (6th Cir. 1974), vacated for further consideration in light of *Alyeska* (presumably as to the part of the opinion upholding an award against a defendant individually on a private attorney general theory), 421 U.S. 982 (1975). In an intervening decision, *Milburn v. Huecker,* 500 F.2d 1279 (6th Cir. 1974), another panel permitted an award of attorneys' fees in an opinion which denies retroactive welfare benefits on the ground of *Edelman's* interpretation of the eleventh amendment, but, in discussing attorneys' fees, makes no reference to *Edelman* or the amendment although citing *Sims. Milburn* was cited in *Taylor* only for another point. 503 F.2d at 904. Judge Edwards dissented in *Taylor,* arguing, *inter alia,* that *Sims* was binding. 503 F.2d 906, 907-908. Finally, the Third Circuit, in *Skehan v. Board of Trustees,* 501 F.2d 31, 42 (3d Cir. 1974), vacated in light of *Alyeska* and *Wood v. Strickland,* 421 U.S. 983 (1975), held that *Edelman* "appears to bar the award of attorneys fees from the state treasury," and in a footnote attributes the Supreme Court's failure to overrule its summary affirmance of *Sims* to inadvertence. See also *Sincock v. Obara,* 320 F.Supp. 1098 (D. Del. 1970) (three-judge court).

defendants specifically raised the attorneys' fees issue, 41 U.S.L.W. 3090, and asserted that the award of attorneys' fees against "elected state officials sued in their official capacity . . . was tantamount to the award of a monetary judgment against the State of Alabama in direct violation of the doctrine of sovereign immunity." See *Newman v. Alabama, supra,* — F.2d at — (Judge Gewin dissenting). A state's sovereign immunity was historically, see *Hans v. Louisiana,* 134 U.S. 1 (1890), the basis for the line of cases culminating in the present doctrine that the eleventh amendment governs suits against a state by its own citizens, even though the literal words of the amendment refer only to suits "by Citizens of another State, or by Citizens or Subjects of any Foreign State." See *Edelman v. Jordan, supra,* 415 U.S. at 663. Compare Mr. Justice Brennan's dissenting remarks in *Yeomans v. Kentucky,* —— U.S. ——, ——, 44 U.S.L.W. 3303, 3304 (1975). Accordingly, it would appear that the *Sims* jurisdictional statement sufficiently raised the question of whether the eleventh amendment barred the attorneys' fees award. There can be no doubt, moreover, that the Court intended to rule on the award of attorneys' fees. The initial publication of its order in the unbound volume of official reports referred only to 336 F.Supp. 924, the decision on the merits, as affirmed. As finally published, however, the order of affirmance included 340 F.Supp. 691, the decision which awarded attorneys' fees and costs. 409 U.S. 942. We believe that the Supreme Court's summary affirmance of the district court's award of attorneys' fees against state officials in their official capacity was a decision on the merits of the immunity issue presented to us in this case.

In *Hicks v. Miranda,* 422 U.S. 332, 344-345 (1975), the Supreme Court set at rest any doubts about whether its summary disposition of a case on the merits is binding on the lower federal courts:

> "[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.' "

We do not find in *Edelman v. Jordan* evidence of an intention to overrule *Sims* or of a doctrinal development indicating that *Sims* would be decided differently today. *Cf. Hicks*

v. Miranda, supra, 422 U.S. at 344.[3] Mr. Justice Rehnquist observed in *Edelman* that the difference between prohibited and permitted relief "will not in many instances be that between night and day," 415 U.S. at 667. The prescience of that observation is illustrated by the conflicting views of the circuits and of judges within the circuits on the question before us. Finally, the citation of *Sims* without comment in the footnote in *Alyeska* which collects the conflicting cases on the application of the eleventh amendment to attorneys' fees, 421 U.S. at 269, n. 44, does not, in our view, show an intention to repudiate the *Sims* holding. A signal to the lower courts would take, we think, a clearer form than that.

AFFIRMED.

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Clerk of the United States Court of Appeals for the Seventh Circuit

[3] Compare the discussion in the Sixth Circuit's *Jordan v. Gilligan, supra,* 500 F.2d at 707-708, with *Doe v. Hodgson,* 500 F.2d 1206, 1207-1208 (2d Cir. 1974), and Judge Edwards dissent in *Taylor v. Perini, supra,* 503 F.2d at 907.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

LOUISE BOND et al
Plaintiffs
v.
WAYNE STANTON et al
Defendants
No. 73 H 184

ORDER

This Court, in its order of March 22, 1974, *Bond v. Stanton,* 372 F.Supp. 872, 875 (ND Ind. 1974), reserved ruling on the plaintiffs' request for attorney fees "pending the filing of supplemental briefs directed to this issue and an accounting of actual costs." Having considered the extensive briefs of both parties, the Court now finds as follows:

1. That this Court has the equitable power to award attorney fees in cases brought pursuant to 42 U.S.C. § 1983 and that this is a proper case in which to make such an award.

2. Plaintiffs meet the requirements of the "private attorney general" theory for awarding attorney fees in that (a) the rights enforced, i.e. right to the benefit of an effective EPSDT program, flows from a program that was considered to be of great importance and priority by Congress, and (b) the suit furthers the interests of a substantial class of persons in Indiana.

3. Although not necessary for an award of attorney fees, an additional reason for awarding attorney fees in this case is the demonstrated lack of good faith on the part of the defendants who were more than two years late in even attempting to implement a statewide EPSDT program and continually asserted compliance with HEW requirements in the fact of documentation to the contrary. Evidence to support this finding was also adduced in the hearing held on November 5, 1973 on cross-motions for summary judgment.

4. The Eleventh Amendment to the United States Constitution does not bar an award of attorney fees against the state defendants because such fees fall within the permissible "ancillary effect on the state treasury" as outlined in *Edelman v. Jordan*, 94 S.Ct. 1347, 1358 (1974). County defendants are not protected by the Eleventh Amendment, Id. at 1358 n. 12. See also *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974).

5. Both the Valparaiso University School of Law Legal Aid Clinic and Project Justice and Equality are proper recipients of an award of attorney fees because neither can in any way be considered a part of federal, state or local government, they generally represent individuals and organizations who would otherwise receive no legal representation, they must expend considerable sums to meet the expenses of litigation and the decision to award fees should not stand on the status of the party awarded fees.

6. In determining the amount of fees to be awarded this Court must consider the following factors:

(a) The attorneys and law students representing the plaintiffs are experienced in this type of litigation and demonstrated a high degree of competency in pursuing this matter on behalf of the plaintiffs and members of the class;

(b) The case was relatively complex and novel in that only one other case involving EPSDT had been decided prior to the filing of this case;

(c) As pointed out by the Seventh Circuit in affirming the decision of this Court, the EPSDT program is of vital importance to the health needs of the low income plaintiffs and members of the class and it has been given priority by the Congress of the United States;

(d) The number of hours spent by the attorneys (118.3 hours) and law students (365 hours) on this case.

Therefore, it is hereby ordered that the plaintiffs request for attorney fees is granted and the defendants, Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, in their official capacities are hereby ordered to pay the sum of $2,366.00 to the plaintiffs as attorney fees. This amount

represents compensation at the rate of $20.00 per hour 112.4 attorney hours and $30.00 per hour for the 6 attorney hours in court. It shall be paid directly to the attorneys for the two organizations involved and it will be their responsibility to divide the funds between the organizations. Plaintiffs are also awarded costs pursuant to *Boston Chapter, NAACP, Inc. v. Beecher*, —— F.2d ——, (1st Cir. 1974), 43 U.S.L.W. 2228, dec. November 8, 1974.

Enter January 13, 1975.

/s/ Allen Sharp

Judge, United States District Court

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 3, 1975.

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

WAYNE STANTON, et al., Defendants-Appellants, No. 74-1409 vs. LOUISE BOND, et al., Plaintiffs-Appellees.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 73 H 184 Allen Sharp, *Judge*.

ORDER

Pursuant to Rule 39 of the Federal Rules of Appellate Procedure, and after having prevailed on appeal, plaintiffs-appellees have applied to this court for costs and attorneys' fees on appeal.

Alyeska Pipeline Service Co. v. *The Wilderness Society,* 43 U.S.L.W. 4561 (U.S. May 12, 1975), forecloses an award of attorneys' fees on a private attorney general rationale in the absence of statutory authorization as in this case. Additionally, this is not an appropriate case for utilization of the "common benefit" or "common fund" theory. *Townsend* v. *Edelman,* slip op. Nos. 73-1960, 1961 at 11 (7th Cir., June 2, 1975); *Satoskar* v. *Real Estate Commission,* slip op. No. 74-1946 (7th Cir., June 2, 1975). Finally, our examination of the record on appeal convinces us that the defendants-appellants were not in bad faith in prosecuting this appeal.

The plaintiffs-appellees' request for attorneys' fees on appeal is denied and the Clerk is ordered to award costs to the plaintiffs in the amount of $67.90.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
February 19, 1976.

Before
Hon. PHILLIP W. TONE, Circuit Judge

LOUISE BOND, ET AL., Plaintiffs-Appellees, No. 75-1459 vs. WAYNE A. STANTON, ET AL., Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. (CV 73 H 184)

This matter comes before the court on the "Application For Costs And Attorney Fees" filed herein on January 21, 1976 by counsel for the plaintiffs-appellees, and the "Motion To Deny Payment Of Attorney Fees" filed herein on February 9, 1976 by counsel for the defendant-appellant. On consideration whereof, this Court being fully advised in the premises,

IT IS ORDERED that the aforesaid application of the plaintiffs-appellees is hereby DENIED.